RY
COURT U. S.
Office-Supreme Court, U.S.
FILED
OCT 22 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 50

UNITED STATES OF AMERICA,
Petitioner,

v.

DANLEL ANDREW SEEGER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

HERBERT A. WOLFF
LEO ROSEN
285 Madison Avenue
New York, New York 10017
Attorneys for
The American Ethical Union
Amicus-Curiae

Of Counsel:
GREENBAUM, WOLFF & ERNST
NANETTE DEMBITZ
NANCY F. WECHSLER

TABLE OF CONTENTS

	PAGE
THE INTEREST OF THE AMERICAN ETHICAL UNION	1
ARGUMENT—The First and Fifth Amendments prohibit discrimination against conscientious objectors who hold non-theistic beliefs	4
A. The Beliefs of the Non-Theistic Religions	6
B. The History and Development of Non-Theistic Religion	11
C. Non-Theistic Religions Today	13
D. First Amendment Protection of Non-Theistic Religion	14
E. Lack of Reasonable Basis for Discrimination	16
CONCLUSION	23

TABLE OF AUTHORITIES

Cases:

Berman v. United States, 156 F. 2d 377 (9th Cir. 1946) (rendered by a divided court), *cert. denied*, 329 U. S. 795 17

Braunfeld v. Brown, 366 U. S. 599 16

Fellowship of Humanity v. County of Alameda, *et al.*, 153 Cal. App. 2d 673, 315 P. 2d 394 (1957) 14, 15

McGowan v. Maryland, 366 U. S. 420 14

Peter v. United States, 324 F. 2d 173 (9th Cir. 1963) 18

Phillips v. Downer, 135 F. 2d 521 (2d Cir. 1943) 18

PAGE

Sherbert v. Verner, 374 U. S. 398 16

Torcaso v. Watkins, 367 U. S. 488 ..... 2, 5, 6, 14
Thomas v. Collins, 323 U. S. 516 15

United States v. Jakobson, 325 F. 2d 409 (2d Cir. 1963) 18
United States v. Macintosh, 283 U. S. 706, dissenting opinion of Hughes, C. J. 15

Washington Ethical Society v. District of Columbia, 249 F. 2d 127 (D. C. Cir. 1957) 3, 15
West Virginia State Board of Education v. Barnette, 319 U. S. 264 15

Texts, Articles and Periodicals:

A Guide to the Religions of America (Rosten ed. 1955) 2
Adler, Creed and Deed (1886) 7
Aiken, ed., The Age of Ideology; The 19th Century Philosophers (1956) 11
American Ethical Union, Do You Know the Ethical Movement? 3
Archer, Faiths Men Live By (1934) 13

Barth, Evangelical Theology (1963) 20
Blau, ed., American Philosophic Addresses (1946) 12
Blau, Men and Movements in American Philosophy (1952) 12
Blau, The Story of Jewish Philosophy (1962) 19
Burtt, Types of Religious Philosophy (1939) 2

Cargill, ed., Henry Thoreau, Selected Writings on Nature and Liberty (1952) 12
Cassirer, Kristeller and Randall, The Renaissance Philosophy of Man (1948) 11

	PAGE
Collier, The Standard (Jan.-Feb., 1951)	8
Comfort, Quakers in the Modern World (1952)	15
Commager, Theodore Parker (1936)	12
Dewey, A Common Faith (1934)	7
21 Dictionary of American Biology (Starr ed. 1944)	2
Dirks, The Critical Theology of Theodore Parker (1948)	12
10 Encyclopedia Americana (1947 ed.)	2
8 Encyclopedia Brittanica (14th ed. 1932)	2
5 Encyclopedia of Religion and Ethics (Hastings ed. 1928)	2
Ferm, ed., A History of Philosophical Systems (1950)	11
Ferm, ed., Religion in the Twentieth Century (1948)	2
Freud, Civilization and its Discontents (1930)	21
Fromm, Man for Himself: An Inquiry into the Psychology of Ethics (1947)	21
Fromm, Psychoanalysis and Religion (1950)	10
Hinds, American Communities (2d ed. 1908)	12
Hutchinson, Twentieth Century Encyclopedia (rev. ed. 1952)	13
Hutchinson and Martin, Ways of Faith (1953)	2
Huxley, Religion without Revelation (1957)	10
Kant, Critique of Pure Reason (1781)	11
Mill, Nature and the Utility of Religion (1958)	11
Morain, Humanism as the Next Step (1954)	10
Muzzey, Ethics as a Religion (1951)	7, 18
Niebuhr, The Nature and Destiny of Man (1943)	19
Nielson, Religion and the Modern Predicament, The Humanist (Jan.-Feb. 1958)	9

PAGE

2 Parrington, Main Currents of American Thought (1930) 12
Potter, The Story of Religion (1939) 13

Reese, ed., Humanist Sermons (1927) 8, 9
Rivkin, Leon da Modena and the Kol Sakhal (1952) 11

Schneider, ed., Benjamin Franklin, The Autobiography and Selections (1952) 11
Schneider, A History of American Philosophy (1946) 12
Spurrier, Guide to the Christian Faith (1952) 20

Tsanoff, The Great Philosophers (1953) 11

U. S. Bureau of the Census, Dep't of Commerce, Religious Bodies, 1936 (1941) 2

von Hildebrand, Christian Ethics (1953) 21

Wheelwright, A Critical Introduction to Ethics (1949) 22
Whitehead, Religion in the Making (1926) 10
Wieman, The Directive in History (1949) 19
Williams, What Americans Believe and How They Worship (1952) 13
Wolfson, Philo; Foundations of Religious Philosophy In Judaism, Christianity and Islam (1947) 11

Yearbook of American Churches (Landis ed. 1958) 2

IN THE

Supreme Court of the United States

October Term, 1964

No. 50

UNITED STATES OF AMERICA,

Petitioner,

v.

DANIEL ANDREW SEEGER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union with the consent, filed with this Court, of both parties.

The American Ethical Union is a federation of the Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious fellowship know as the "Ethical Movement" or the "Ethi-

cal Culture Movement". The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. The Movement has had a marked growth in recent years. Since 1949 membership has doubled and the number of Societies and Fellowships has increased four-fold.

There are today thirty Societies and Fellowships of the American Ethical Union in eleven states and the District of Columbia. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of Humanist and Ethical Culture groups. At the third International Congress held in Oslo in 1962, delegates attended from 24 countries including the United States, Great Britain, Iran, Holland, Norway, Germany, Japan and Colombia.

Ethical Culture has been recognized as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso* v. *Watkins*, 367 U. S. 488 at 495, n. 11. Ethical Culture is listed as a religion in the Census of Religious Bodies published by the Federal Government,[1] and in various religious publications[2] and general reference works.[3] Federal tax exemption rulings have been issued

1. U. S. Bureau of the Census, Dep't of Commerce, *Religious Bodies, 1936* (1941).

2. *Yearbook of American Churches* (Landis ed. 1958); *A Guide to the Religions of America* (Rosten ed. 1955); Burtt, *Types of Religious Philosophy* (1939); Ferm, ed. *Religion in the Twentieth Century* (1948); 5 *Encyclopedia of Religion and Ethics* (Hastings ed. 1928).

3. Hutchinson, *Twentieth Century Encyclopedia* (rev. ed. 1952); 21 *Dictionary of American Biography* (Starr ed. 1944); 8 *Encyclopedia Brittanica* (14th ed. 1932); 10 *Encyclopedia Americana* (1947 ed.).

to the American Ethical Union and to the various Ethical societies. The District of Columbia Society has been held to be "a religious corporation or society," the building of which "is one primarily and regularly used by its congregation for public religious worship," within the meaning of the District of Columbia Code provision exempting property of "religious societies" from certain local taxes. *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957).

All the Ethical Culture Societies and Fellowships conduct services and most conduct religious schools for children which meet regularly on Sunday mornings. The Leaders of the Ethical Culture Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the services customarily performed by ministers of religion, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

A fundamental tenet of Ethical Culture is the freedom of each individual to determine for himself whether or not to relate his religious aspirations to the existence of a Supreme Being. The Ethical Movement has no fixed creed or dogma, and requires no particular theological beliefs of its members. It

> "holds that, although the universe which we all share, speaks to us in different accents or tongues, no one can

be sure, or prove to others, which one is true. The Ethical Movement therefore, is uncommitted on theological and metaphysical questions. Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind." [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y. p. 3]

The American Ethical Union is concerned with any Governmental elevation and approval of theism as the only true religion and the deprecation of its own religious pattern. It has an interest in the continued recognition of Ethical Culture as a religion for all purposes, including the right of its members to conscientious objector status on an equal basis with adherents of other faiths. It has a further interest in preserving the rights of individual conscience free from Governmental imposition of any rigid orthodox formula defining religion.

ARGUMENT

The First and Fifth Amendments prohibit discrimination against conscientious objectors who hold non-theistic beliefs.

Endeavoring to avoid repetition of other briefs herein, we will present in this brief considerations which demonstrate, we believe, the unconstitutionality of the Government's use of belief in a Supreme Being as the criterion of

religion; the established and important role of non-theistic religions; the lack of justification for the Supreme Being clause from the standpoint of administrative convenience; and the unreasonableness, even apart from the First Amendment's guarantee of Government neutrality between religions, of discriminating between conscientious objectors who hold theistic beliefs and those who hold non-theistic beliefs.

The issue before the Court is whether the Government can, consistently with the First Amendment, act as the arbiter of religions, determining what is accredited religious belief or what an individual must believe to be religious. Almost throughout its argument, however, the Government assumes that "religion" within the protection of the First Amendment necessarily implies belief in divine command, God, and a Supreme Being[4], thus assuming the answer to the crucial issue and avoiding confrontation with the reasoning of the Court below.

In refutation of the Government's interpretation of the First Amendment, stands this Court's *Torcaso* opinion. There it recognized that religion in the First Amendment sense includes both "religions based on a belief in the existence of God" and "religions founded on different beliefs." The Court mentioned several religions, including Ethical Culture, "which do not teach what would generally be considered a belief in the existence of God • • •" (367 U. S. at p. 495, n. 11). The Supreme Being provision and the Government's defense of it can be reconciled with *Torcaso* only if it be supposed that this Court there used the

4. *E.g.*, Govt. Brief, pp. 10, 13, 20, 22, 24, 35, 71, 75-77.

word "God" in some sense which differs from "Supreme Being." Such a differentiation, however, would permit the Government to intrude and draw metaphysical distinctions in the area of spiritual belief—exactly the result which we think *Torcaso* intended to proscribe. Indeed, the type of ratiocination in the Government brief as to the nature of a Supreme Being (Govt. Br., pp. 72-75), illustrates, we believe, the evil of the clause and the value of the *Torcaso* doctrine that concern with a theistic or non-theistic basis of religion is not the business of Government.

The recognition in *Torcaso* of religions without a theistic creed, was based on the established place of these religions historically and in the culture of today.

A. The Beliefs of the Non-Theistic Religions

Non-theism is a view which neither categorically denies, nor dogmatically affirms, the existence of a Supreme Being. Recognizing the limitations and the fallibility of the human intellect and the proper restriction of its use to matters of experience, non-theism argues that the existence or non-existence of God is not susceptible of proof and should, therefore, be left entirely within the realm of private belief. Organized non-theistic religious groups, such as the Ethical Culture Societies, include members whose personal faith includes a Supreme Being, and those whose personal faith does not.

As long ago as 1886, Felix Adler, founder of the Ethical Movement, pointed out:

> "Religion is not identical with theology. It is indeed often maintained that the belief in a personal God

> should be regarded as the foundation and criterion of religion * * *."

But, he added,

> "It is the moral element contained in it that alone gives value and dignity to any religion, * * *. The appeal to conscience has ever been the lever that raised mankind to a higher plane of religion."[5]

Three decades ago John Dewey wrote *A Common Faith,* devoted to separating "the religious phase of experience * * * from the supernatural and the things that have grown up about it." [Dewey, *A Common Faith* (1934), p. 2.] He wrote that religious qualities "are not bound up with any single item of intellectual assent, not even that of the existence of the God of theism" (*ibid.* p. 32). To him "religious" signified an attitude, "independent of the supernatural" (*ibid.* p. 66).

In his book, *Ethics as a Religion* (1951), Dr. David Saville Muzzey, a Leader in the Ethical Culture Movement, points out (pp. 86-87) that "Everybody except the avowed atheists (and they are comparatively few) believes in some kind of God", and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of a God do you believe in?" In an attempt to answer that question Dr. Muzzey continues (p. 95):

> "Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely

5. Adler, *Creed and Deed* (1886), pp. 37, 163-164.

> mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that expresses itself in the human world as the power which inspires in man moral purpose."
>
> * * *
>
> "Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'"

Lord Snell, a former President of the British Ethical Union, described the non-theistic position of the Ethical Culture Movement as follows:

> "The central purpose of the Ethical Culture Movement is to establish in the world a religion devoted to the right, apart from supernatural sanctions * * * With regard to the ultimate nature of things, a life after death and the final goal of the universe, the Ethical Movement affirms no creed. Its members may have divergent views on these problems but they unite in devotion to good action in the world in which they live."[6]

The viewpoint of the Humanist Movement has been set forth by Curtis W. Reese, Secretary, Western Unitarian Conference, as follows:

> "To Humanism 'worship' means the reverential attitude toward all that is wonderful in persons and

6. Quoted by W. Edwin Collier in *The Standard* (Jan.-Feb. 1951) p. 223.

throughout all of life; a wistful, hopeful, expectant attitude of mind, not abject homage to either 'Humanity' or 'God' * * *

"Humanism is not Atheism. Atheism is properly used as a *denial* of God * * * [T]he Humanist attitude toward the idea of God is *not that of denial* at all; it is that of *inquiry*. The Humanist is questful; but if the quest be found fruitless he will still have his basic religion intact, viz., the human effort to lead an abundant life." (Reese, ed., *Humanist Sermons* (1927), pp. vii, viii. Emphasis in original.)

A more recent statement of the non-theistic, humanistic approach to the problems of belief is set forth in an article by Professor Kai Nielson of Amherst College:[7]

"Religion is not a kind of science—not even a 'supra-science'; nor is it any other kind of a *theory*. It is instead a practical activity with some reasonably definite functions. Religious discourse is essentially a figurative, non-literal discourse * * * [R]eligious utterances are ritualistic or ceremonial utterances that express our basic commitments and concerns.

* * *

"The function of religion in a culture in crisis (or for that matter in any culture) is to serve as a figurative expression of the regulative maxims that guide men's lives and express their ultimate concerns.

* * *

"I would argue that a resolute humanism is best able to meet men's religious needs in a democratic and scientifically oriented society * * * [It] can see the creativity in all religious expressions without assuming the uniqueness or dominance of any single sym-

7. Religion and the Modern Predicament, *The Humanist* (Jan.-Feb. 1958) pp. 26, 28, 29.

bolic form * * * [and] can see and assert the religious (ideal) qualities in natural experience.

* * *

"Humanism does not, as it is often parodied as doing, worship man's ego-centered image of his own divinity, though humanism quite rightly recognizes and emphasizes man's worth and dignity * * * The object of worship for a humanist is indeed man; but here the noun 'man' is understood collectively as denoting all mankind, and not as denoting man taken distributively with his masterless egocentric worship of his individual ego's lusts to power."

These samples of Humanist and Ethical Culturist nontheistic thought could be multiplied many times by quotations from world-renowned philosophers and psychologists. Alfred North Whitehead declared that "Religion is what the individual does with his own solitariness." A. Eustace Haydon conceives of religion as "the shared quest for the good life." Erich Fromm recognizes nontheistic as well as theistic religions and defines religion as "any system of thought and action shared by a group which gives the individual a frame of orientation and an object of devotion." And the celebrated biologist, Julian Huxley, has written:

"I have called this book *Religion without Revelation* in order to express at the outset my conviction that religion of the highest and fullest character can co-exist with a complete absence of belief in revelation in any straightforward sense of the word, and of belief in that kernel of revealed religion, a personal god."[8]

8. Whitehead, *Religion in the Making* (1926), p. 16; Haydon, as quoted in Morain, *Humanism as the Next Step* (1954), p. 12; Fromm, *Psychoanalysis and Religion* (1950), p. 21; Huxley, *Religion without Revelation* (1957), p. 1.

B. The History and Development of Non-Theistic Religion

The roots of the non-theistic religious movement in Western culture go far back. Such views are found in the Middle Ages, and during the renaissance there was a resurgence of non-theistic philosophy and a renewed interest in human problems and the concept of the dignity of man.[9] Non-theistic religious views are found in Jewish thought of the sixteenth and seventeenth centuries,[10] and in the writings of Spinoza,[11] Kant,[12] Auguste Comte, and John Stuart Mill.[13] In the early days of the United States, Benjamin Franklin, Thomas Jefferson, Thomas Paine and many others expressed interest in the development of a religion based on reason rather than revelation.[14]

It was during the nineteenth century, however, that non-theistic religious movements developed significantly in American life. It was, in part, the revolt against dogmatism which led the New England Unitarians to transmute

9. Kristeller, in Ferm, ed., *A History of Philosophical Systems* (1950), pp. 227-238; Cassirer, Kristeller and Randall, *The Renaissance Philosophy of Man* (1948).

10. Rivkin, *Leon da Modena and the Kol Sakhal* (1952), pp. 6-17.

11. Wolfson, *Philo: Foundations of Religious Philosophy in Judaism, Christianity and Islam* (1947), pp. 458-459.

12. Kant, *Critique of Pure Reason* (1781); Book II, §2, Chap. III, §7; Tsanoff, *The Great Philosophers* (1953), p. 455.

13. Aiken, ed., *The Age of Ideology: The 19th Century Philosophers* (1956), pp. 122-123; Mill, *Nature and the Utility of Religion* (1958), pp. 68-69.

14. Schneider, ed., Benjamin Franklin: *The Autobiography and Selections* (1952), xiv, 57.

the traditional concept of divine Christ to the concept of a human Jesus, a great moral teacher and leader. William Ellery Channing, their most distinguished leader, said "the adoration of goodness—this is religion."[15] The transcendentalism of Emerson[16] and Thoreau[17] and the "manly theology" of Theodore Parker,[18] were primarily concerned with man and his relation to his fellow man. Their basic concern was to subordinate inconclusive debate about the existence and nature of God to an attempt to improve human society by furthering humaneness in the relations between man and man.

After the Civil War, non-theistic religious movements in the United States began to multiply. Unlike the pre-Civil War groups, which had attempted to establish Utopian communities,[19] the newer movements continued to live in the world and to attempt to change it by participating in social reforms. Out of the Unitarian group there began in 1866 the important Free Religious Association,

15. 2 Parrington, *Main Currents of American Thought* (1930), p. 332.

16. Schneider, *A History of American Philosophy* (1946), Ch. 25; Blau, *Men and Movements in American Philosophy* (1952), pp. 121-131; Blau, ed., *American Philosophic Addresses, 1700-1900* (1946), pp. 586-604.

17. Blau, *Men and Movements in American Philosophy* (1952), pp. 131-141; Cargill, ed., Henry Thoreau: *Selected Writings on Nature and Liberty* (1952); pp. 56-107.

18. Schneider, *A History of American Philosophy* (1946), Ch. 24; Dirks, *The Critical Theology of Theodore Parker* (1948); Commager, *Theodore Parker* (1936).

19. Such communities included Brook Farm and Fruitlands, and the communal village of Modern Times (now called Brentwood) on Long Island in New York State. See Hinds, *American Communities* (2d ed. 1908).

which Emerson joined in his later years. The Association was most influential in its insistence that social reform activities were an integral part of religious faith, and in its refusal to make acceptance of theism a condition of membership. Felix Adler, founder of the Ethical Movement, was a member of the Free Religious Association for ten years. He resigned its presidency in 1882 and devoted himself to the Society for Ethical Culture in New York City, which he had founded several years before, in 1876.

C. Non-Theistic Religions Today

A widely-used authoritative survey of American religious beliefs and practices points out the truly religious character of non-theistic movements, which are described as "nonecclesiastical spiritual movements." It states:[20]

> "Unfortunately this aspect of America's religious life has been the object of but little serious study. Most of these movements do not gain their chief impetus from an organization, their major tenets are almost never set down in formal creeds; and statistics on the number of adherents are either meager or nonexistent * * * Yet such knowledge as we have forces us to the conclusion that these nonecclesiastical movements furnish the vital spiritual orientation of multitudes of the American people * * * and must be taken into account in any realistic appraisal of the religious situation in the United States."

Neither Buddhism nor Confucianism professes belief in a Supreme Being;[21] yet both are unquestionably re-

20. Williams, *What Americans Believe and How They Worship* (1952), pp. 351-352.

21. Potter, *The Story of Religion* (1939), xvii-xviii; Archer, *Faiths Men Live By* (1934), p. 270; Hutchinson and Martin, *Ways of Faith* (1953), p. 134.

garded and treated as religions. To quote the opinion of a court in California:

> "* * * there are forms of belief generally and commonly accepted as religions and whose adherents, numbering in the millions, practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions." *Fellowship of Humanity* v. *County of Alameda, et al.,* 153 Cal. App. 2d 673, 315 P. 2d 394 (1957).

Thus, as was recognized in *Torcaso,* to exclude non-theistic belief from the constitutional concept of "religion" would be to exclude, among others, some of the major faiths of the world which are traditionally recognized as "religions."[22]

D. First Amendment Protection of Non-Theistic Religion

This Court's recognition in *Torcaso* that religion in a constitutional sense embraces non-theistic beliefs had been foreshadowed in earlier cases. See *McGowan* v. *Maryland,* 366 U. S. 420, 466 (opinion of Frankfurter, J.): the Establishment Clause relates to

> "a specific, but comprehensive, area of human conduct: man's belief in the verity of some transcendental idea

22. The Government confuses the issue when it speaks of a continuum of beliefs ranging into the political judgments made by Congress and the President under the war-making power (Govt. Br. p. 35). Questions of religious and conscientious belief, which is the only type of belief here involved, are outside the political province.

and man's expression in action of that belief or disbelief."[23]

Historically, the draftsmen of the First Amendment must have envisioned its protection of non-theistic belief, considering the prominence and standing of the Quaker sect among the religions of the time.[24] Like Ethical Culture, the Quaker faith does not dictate a belief in a Supreme Being.[25]

With recognition that the First Amendment's religion clauses protect non-theism as well as theism, it follows that the Supreme Being provision contravenes the First Amendment, and also the Fifth Amendment's due process clause, for it differentiates between conscientious objectors on a basis that is not permissible under the First Amendment. Under this provision, the Government approves, encourages and favors one religion while burdening another: an Ethical Culture member, for example, with a

23. See also *Thomas* v. *Collins*, 323 U. S. 516. And in *Washington Ethical Society* v. *District of Columbia*, and *Fellowship of Humanity* v. *County of Alameda*, cited *supra*, pp. 3 and 14, Ethical Culture and humanist groups respectively were held, despite their non-theistic creeds, to be "religious" within the meaning of tax exemption statutes, in part because the courts thought discrimination against them might be unconstitutional.

24. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 653, as to presence of Quakers in the United States in its formative period. See *United States* v. *Macintosh*, 283 U. S. 605, 622 to 633, dissenting opinion of Hughes, C.J., citing early New York constitution exempting Quaker conscientious objectors from military service.

25. See William Wister Comfort (President of Friends Historical Society, past President of Haverford College), *Quakers in the Modern World* (published by MacMillan, 1952), c. 5; The Foundation Tenets of Quakerism; Comfort, *The Quaker Way of Life* (1945), p. 8, quoting George Fox, a founder of Quakerism in 1624, as to "That of God in every man".

non-theistic conscientious objection to war must either compromise and forego his belief or undergo a criminal penalty. Compare *Sherbert* v. *Verner*, 374 U. S. 398, 404. If "the effect of a law * * * is to discriminate invidiously between religions, that law is constitutionally invalid * * *" *Braunfeld* v. *Brown*, 366 U. S. 599, 607.

It may be suggested that Government neutrality between religions is less than an absolute principle. For, the Government can prohibit a religious exercise which constitutes a danger to the public welfare;[26] in a sense, it thereby disfavors that religion while relatively aiding the others. However, the non-neutrality there is far different from the partiality in the provision at bar, for here the Government discriminates between individuals exercising the *same* religious belief—objection to combat—depending on their religious premises.

No justification can be posited for such a drastic negation of the principle of neutrality. Indeed, as we shall show, the statutory discrimination against non-theists so lacks justification, that even apart from the First Amendment guarantees, it violates the equal protection aspect of due process.

E. Lack of Reasonable Basis for Discrimination

1. The justification suggested for the Supreme Being clause—that it serves administrative convenience in determining exemptions—seems illogical.

---

26. *E.g.*, *Reynolds* v. *United States*, 98 U. S. 145: prosecution of a Mormon for polygamy held constitutional.

The purpose of the addition of this clause to the statute was to incorporate the concept of religion enunciated in a Ninth Circuit opinion.[27] Neither the opinion nor the statutory draftsmen indicated any intention of simplifying administration.

Determination of the registrant's belief in a Supreme Being is of no assistance in making the fundamental finding as to whether he conscientiously objects to war. Obviously, the administrators cannot draw the sometimes difficult distinction between a registrant's political belief against a particular war and his conscientious belief against all war, on the basis of belief in a Supreme Being.[28] Nor can belief in a Supreme Being help them to determine the sincerity of a registrant's assertion of such a conscientious belief. Most selective service registrants probably hold theistic beliefs and most, of course, are not conscientious objectors.[29] Thus, the Supreme Being clause adds to the administrators' burden by imposing on them responsibility for determination of another belief—including its sincerity—in addition to conscientious objection to war.

27. In *Berman v. United States*, 156 F. 2d 377 (9th Cir. 1946) *rendered by a divided court, cert. denied* 329 U. S. 795. See Sen. Rept. 1268, 80th Congress, 2d Sess. (1948), p. 14, as to the draftsmen's reliance on *Berman*.

28. Rather, the distinction is tested by consideration of the registrant's condonation of combat under non-political circumstances, such as invasion and devastation of his home, or extreme barbarism; thus, some who considered themselves pacifists found themselves warlike when confronted by Hitler's barbarism.

29. According to information supplied by the Selective Service Board by letter dated September 23, 1964, registrants classified as conscientious objectors from June 24, 1948 to June of 1964 totalled 26,053 out of a total, during this period, of 28,036,177 registrants.

The Second Circuit Court of Appeals suggested that a prior amendment of the conscientious objector statute to eliminate the requirement of membership in a particular sect had simplified the administrators' job (*Phillips* v. *Downer*, 135 F. 2d 521, 524 (2d Cir. 1943)).[30]

The burden of an additional finding—imposed on the administrators by the Supreme Being clause—is increased by the difficulty of interpreting the words "Supreme Being". It is not clear whether this phrase connotes a God in anthropomorphic form, a spirit of some super-human character, or a transcendent idea; whether it would include "the qualities of Godness that exist in every creation in Mankind", or "the self-transcendent ground of being" (*United States* v. *Jakobson*, 325 F. 2d 409, 412, 415, note 5 (2d Cir. 1963)), "a belief in the mystery of * * * the essence being alive, * * * respecting and loving this livingness" (*Peter* v. *United States*, 324 F. 2d 173, 177 (9th Cir. 1963)), or the "perfect pattern, envisioned by faith, of humanity, as it should be * * *".[31]

No longer is it possible to insist that there is a strict correspondence between religious belief and affiliation to a particular religious organization. Whatever may have been the case in the past, twentieth-century churches do not and cannot demand adherence to specific beliefs from their members, nor do modern theologians stress the organization of religion. The challenging German Protestant thinker, Dietrich Bonhoeffer, speaks of "religionless

30. During World War I exemption was granted even to non-religious conscientious objectors, as an evolution and, apparently, a simplification of administrative practice (see Govt. Br. pp. 58-59).

31. Muzzey, *Ethics as Religion* (1951), p. 95.

Christianity." Reinhold Niebuhr sees a spiritual danger in overemphasis on the role and value of the church: "When an institution which mediates the judgment of God upon all the ambiguities of historic existence claims that it has escaped those ambiguities by this mission, it commits the same sin which the prophets recognized so clearly as the sin of Isreal."[32] Martin Buber, among Jewish theologians, has shown little concern for the institutional embodiment of religious ideas.[33]

The chief contribution of the prevalent mode of theological thinking today lies in the denigration of collective worship in contrast with the confrontation of each individual with ultimate spiritual reality. The standard nineteenth-century mode of associating belief and organizational affiliation is no longer valid. It has been superseded by changes in the modern conception of the nature of religion.

Within the traditionally theistic religions, ideas of God have become so differentiated that they do not yield readily to testing by the Supreme Being clause. In Protestant Christianity, to go no farther afield, Dr. Henry Nelson Wieman rejects the theological portrait of "God as a reality beyond space and time" and insists that "God must be found in actual events,"[34] thus denying the transcendence of God. Karl Barth, while urging concern for "God with us," yet argues with fervor that this "evangelical"

32. Reinhold Niebuhr, *The Nature and Destiny of Man* (1943), vol. II, p. 145.

33. See Blau, *The Story of Jewish Philosophy* (1962), pp. 295-305.

34. Wieman, *The Directive in History* (1949), p. 20.

God *is* transcendent.[35] William A. Spurrier differs from both and associates the idea of God with "the ultimate power and reality in life."[36] None of these views, although they are statements of men recognized as outstanding leaders of contemporary Protestant theology, is clearly and self-evidently assimilable to the Supreme Being clause. Indeed, the Supreme Being clause is open to such difference in interpretation, that it may offend the due process clause on the score of vagueness and susceptibility to unequal, arbitrary, administrative variation in application.

Finally, it has been suggested that the Supreme Being clause serves administrative convenience by decreasing the number of registrants entitled to exemption. This suggested justification is intolerable under constitutional principles. The crux of the guarantee of equal protection is the requirement of reasonable distinctions: the individual's right to inclusion in a favored group unless he can reasonably be distinguished from it.

3. The Constitutional principle of neutrality between the theist and non-theist (discussed *supra*) is paralleled by the demand from a philosophical, psychological and logical standpoint that the non-theist's conscientious belief be deemed of equal dignity and importance with the theist's.

With the elimination of the statutory requirement of membership in a pacifist religious sect, conscientious objection is necessarily a matter of individual development and personal interpretation, whether the registrant is a theist or a non-theist. A theist may or may not attribute this individually-developed conscientious conviction to di-

35. Barth, *Evangelical Theology* (1963), pp. 6, 12.

36. Spurrier, *Guide to the Christian Faith* (1952), p. 113.

vine command. Thus, even Catholic writers—unquestionably theists—have pointed out that the dictates of conscience are not necessarily connected with one's belief in God.[37]

Historically, as well as currently, philosophers of eminence regard conscience as a sense of right or wrong unrelated to a Diety. British ethical philosophy of the eighteenth century, lying in the direct background of the founders of the American nation and authors of its Constitution, tended to proclaim an intuitionist theory of conscience under which each man has an innate sense of what is right and what is wrong, just as he has an innate sense of color. Opposed to this school, some eighteenth-century European philosophers viewed reason as the sole source of conscience. The American "Founding Fathers" drew from both views: they regarded conscience as innate, but supplemented or supported by human reason.

Thus, aside from some particular schools of theology expounding particular theist creeds, reasoning as to the nature of conscience indicates no basis for discriminating between the conscientious convictions of theists and nontheists. So too is the conclusion from psychological learning. From the psychologists' standpoint, even if in a theist view conscience is the expression of divine command, the command must be "internalized" before it can motivate.[38] Viewed psychologically, a conscientious conviction is a conscientious conviction, however its source may be conceived by the theologians or philosophers.

---

37. Von Hildebrand, *Christian Ethics* (1953), pp. 455-456.

38. Fromm, *Man for Himself: An Inquiry into the Psychology of Ethics* (1947), 143-145; compare Freud, *Civilization and its Discontents* (1930), 104-122.

Finally, only the metaphysicians will quibble as to whether a theist, who attributes his conscientious objection to divine command, feels more compelled thereby and endures greater emotional suffering from his disobedience than the non-theist. Thus, George Eliot (Marian Evans) is quoted in a conversation "concerning God, immortality, and duty, in which she 'pronounced with terrible earnestness how inconceivable was the first, how unbelievable was the second, how peremptory and absolute was the third.'"[39]

In sum, analysis from the standpoint of the various pertinent fields of knowledge, indicate no reasonable basis for discriminating between conscientious objectors who believe in a Supreme Being and those who do not.

39. Wheelwright, *A Critical Introduction to Ethics* (1949), 125.

Conclusion

Amicus **submits that the Supreme Being clause of the Selective Service Act of 1948 is an unconstitutional discrimination against conscientious objectors of non-theistic beliefs and an unconstitutional preference of theistic religion over non-theistic religion, in violation of the First Amendment; that the Supreme Being clause creates an arbitrary, unreasonable and impermissible classification between conscientious objectors of theistic belief and those who follow non-theistic religions in violation of the ~~Fourteenth~~ FIFTH Amendment, and that the decision of the Court of Appeals should therefore be affirmed.**

October, 1964

Respectfully submitted,

HERBERT A. WOLFF
LEO ROSEN
285 Madison Avenue
New York, New York 10017
Attorneys for
The American Ethical Union
Amicus Curiae

Of Counsel:
GREENBAUM, WOLFF & ERNST
NANETTE DEMBITZ
NANCY F. WECHSLER